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**Supreme Court of the United States**

**OCTOBER TERM, 1938**

**No. 30**

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**THE COLORADO NATIONAL BANK OF DENVER AND  
GERTRUDE HENDRIE GRANT, EXECUTORS OF  
THE ESTATE OF EDWIN B. HENDRIE, DECEASED,  
PETITIONERS,**

**vs.**

**COMMISSIONER OF INTERNAL REVENUE**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT**

---

**PETITION FOR CERTIORARI FILED MAY 2, 1938,**

**CERTIORARI GRANTED MAY 31, 1938.**



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

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THE COLORADO NATIONAL BANK OF DENVER AND  
GERTRUDE HENDRIE GRANT, EXECUTORS OF  
THE ESTATE OF EDWIN B. HENDRIE, DECEASED,  
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## INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Tenth Circuit.....	a	1
Caption .....(omitted in printing).....	a	
Proceedings before United States Board of Tax Appeals.....	1	1
Appearances and docket entries.....	1	1
Petition .....	3	2
Exhibits:		
"A"—Notice of deficiency, dated September 13, 1934 .....	8	7
"B"—Memorandum of trust agreement between Edwin B. Hendrie and Colorado Na- tional Bank of Denver.....	10	9
"C"—Commissioner's tentative findings, dated January 23, 1934 .....	15	14
"D"—Part 1—Assets of trust as of July 15, 1932	19	18
"D"—Part 2—Differences between the Colorado National Bank list of assets and that recommended by the Government exami- ner in letter of December 15, 1933.....	24	23

Proceedings before United States Board of Tax Appeals—  
Continued.

	Original	Print
Answer .....	27	28
Memorandum opinion, Murdock, M. ....	28	28
Decision .....	30	28
Petition for review and assignments of error.....	30	29
Notices of filing petition for review.....	34	32
Stipulation of facts.....	35	32
Exhibits:		
"A"—Notice of deficiency, dated September 12, 1934 (by reference only).....	36	36
"B"—Commissioner's tentative findings, dated January 23, 1934 (by reference only)...	36	37
"C"—Memorandum of trust agreement (by ref- erence only) .....	36	37
"D"—Affidavit of Dr. J. E. Kinney.....	36	37
Stipulation concerning testimony of Dr. J. E. Kinney.....	36	37
"E"—Affidavit of Frank N. Bancroft.....	41	39
Stipulation concerning testimony of Frank N. Bancroft .....	42	39
"F"—Affidavit of W. W. Grant.....	44	42
Stipulation concerning testimony of W. W. Grant .....	45	43
"G"—Last will and testament of Edwin B. Hen- drie .....	47	44
Præcipe for record .....	50	48
Clerk's certificate .....	51	
Minute entries of argument and submission (omitted in printing) .....	53	
Opinion, Bratton, J. ....	55	49
Dissenting opinion, Lewis, J. ....	59	53
Judgment .....	60	55
Petition for rehearing .....	61	56
Order denying petition for rehearing.....	66	58
Motion for stay of mandate.....	66	58
Order granting motion for stay of mandate.....	70	59
Clerk's certificate.....	70	
Order allowing certiorari .....	71	59



[fol. a]

[Caption omitted]

[fol. 1]

**BEFORE UNITED STATES BOARD OF TAX APPEALS****Docket No. 78040**

**THE COLORADO NATIONAL BANK OF DENVER and GERTRUDE  
HENDRIE GRANT, Executors of the Estate of Edwin B.  
Hendrie, Deceased, Petitioners,**

vs.

**COMMISSIONER OF INTERNAL REVENUE, Respondent**

**Appearances: For Petitioners: Erl H. Ellis, Esq., C. Clif-  
ton Ownes, Esq., (Withdrawn) For Respondent:**

**DOCKET ENTRIES****1934.**

- Dec. 8. Petition received and filed. Taxpayer notified.  
(Fee paid)
- Dec. 8. Copy of petition served on General Counsel.

**1935.**

- Jan. 30. Answer filed by General Counsel.
- Feb. 5. Copy of answer served on taxpayer.
- March 11. Motion for circuit hearing at Denver filed by  
taxpayer 3/11/35 granted.

**1936.**

- May 19. Stipulation waiving hearing filed.
- May 19. Motion to fix time for filing briefs—45 days for  
petitioner, 45 days thereafter for respondent's  
brief and 15 days after respondent's brief for  
petitioner's reply filed by taxpayer.
- May 19. Stipulation of facts filed.
- May 26. Order granting petitioner until 7/5/36 to file  
brief—Commissioner 45 days from date of pe-  
titioner's brief and petitioner shall have 15  
days from date of Commissioner's brief to file  
reply; and that proceeding be assigned to Mr.  
Murdock, Division 3, entered.

[fol. 2]

~~DOCKET ENTRIES~~—Continued

1936.

- July 6. Brief and request for findings of fact filed by taxpayer. 7/7/36 copy served.
- Aug. 17. Brief filed by General Counsel.
- Sept. 8. Reply brief lodged embodying motion for permission to file reply brief filed by taxpayer.
- Sept. 12. Motion for leave to file reply brief out of time granted. 9/14/36 copy served.
- Sept. 19. Memorandum opinion rendered—J. E. Murdock, Division 3. Decision will be entered under Rule 50.
- Oct. 13. Notice of settlement filed by General Counsel.
- Oct. 15. Hearing set Nov. 4, 1936 on settlement under Rule 50.
- Oct. 24. Consent to settlement filed by taxpayer.
- Nov. 9. Decision entered—J. E. Murdock, Division 3.

1937.

- Jan. 30. Petition for review by U. S. Circuit Court of Appeals, 10th Circuit, with assignments of error filed by General Counsel.
- Feb. 5. Proof of service filed by General Counsel. (Service on taxpayer.)
- Feb. 5. Proof of service filed by General Counsel (on attorney for taxpayer).
- March 25. Motion for extension to 6/1/37 to prepare and transmit record filed by General Counsel.
- March 25. Order enlarging time to June 1, 1937 to prepare and transmit record entered.
- April 26. Notice of the withdrawal of C. Clifton Owens, counsel for taxpayer, filed.
- April 27. Precept filed with proof of service thereon.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

PETITION—Filed December 8, 1934

The petitioners above-named hereby petition for a re-determination of the deficiency set forth by the Commission of Internal Revenue in his notice of deficiency MT-ET-CL-1344-Colorado), dated September 13, 1934, and as a basis for their proceeding allege as follows:

1. The petitioners are the Executors of the Estate of Edwin B. Hendrie, deceased, having been duly appointed by the County Court of the City and County of Denver, State of Colorado, on the eighth day of August, 1932. The Colorado National Bank of Denver has its office at Champa and Seventeenth Streets, Denver, Colorado, and Gertrude Hendrie Grant has her residence at 7020 East Twelfth Avenue, Denver, Colorado.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) is dated September 13, 1934, and the petitioners are informed and believe it was mailed to them on said date.

3. The taxes in controversy are estate taxes for the Estate of Edwin B. Hendrie, deceased, and for \$188,108.28.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) Respondent erred in increasing the valuation of certain stocks and bonds, owned by the decedent at the time of his death, in the following amounts:

25 Central Irrigation District 6 per cent Refunding Bonds, Series 8, due January 1, 1929, increased from \$10.00 to \$100.00 per bond, such increase being	\$2,250.00
1,000 shares Acetol Products, Inc., Convertible 'A' stock, no par value, increased from \$4.00 to \$5.00 per share, such increase being	1,000.00
1,000 shares Associated Telephone and Telegraph Co. class 'D' common stock, no par value, increased from \$2.00 to \$3.00 per share, such increase being	1,000.00
1,050 shares Hendrie and Bolthoff Manufacturing and Supply Co. common stock, par value \$100.00 per share increased from \$170.00 to \$200.00 per share, such increase being	31,500.00
<b>Total</b>	<b>\$35,750.00</b>

[fol. 4] and thereby wrongfully increased the gross estate in the aggregate sum of \$35,750.00 by reason of the above over-valuation of the said stocks and bonds.

(b) Respondent erred in including in the gross estate the properties at decedent's death in a trust created by the decedent during his lifetime by a certain written instrument dated January 7, 1927, thereby wrongfully increasing the value of the gross estate in the amount of \$1,034,074.22. A true copy of said trust agreement is hereto annexed, marked Exhibit B, and make a part hereof.

(c) Should it be held that the properties transferred by the decedent during his lifetime by the trust agreement referred to in paragraph (b) above should be included in the gross estate, in that event respondent erred in the valuation of such properties in amounts different from their actual values at the date of decedent's death, as set forth in Part II, of Exhibit D, hereto attached.

(d) Respondent erred in failing to make proper provision on account of expenses that will be incurred in the further administration of the estate, the exact amount of which has not yet been ascertained.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

Generally, that decedent died on July 15, 1932, a resident of the State of Colorado.

Specifically, as respects the alleged instances of error:

(a) That the following stocks and bonds at the time of decedent's death did not have a value in excess of the amounts set opposite the same in the list thereof given below, namely:

25 Central Irrigation District, 6 Per Cent Refunding Bonds, Series 8, due January 1, 1929 .....	\$250.00
1000 shares Acetol Products, Inc., Convertible 'A' stock no par value .....	4,000.00
1000 shares Associated Telephone and Telegraph Co., class 'D' common stock, no par value .....	2,000.00
1050 shares Hendrie and Bolthoff Manufacturing and Supply Co., Common stock, par value \$100.00 per share, .....	178,500.00

[fol. 5] (b) The respondent in the aforesaid notice of deficiency, (Exhibit A, hereto annexed), asserts he sustains

the tentative finding that the properties which were transferred by the decedent by the trust agreement of January 7, 1927, (Exhibit B, hereto annexed), should be included in the gross estate as a transfer under the provisions of Section 302 (c) of the Revenue Act of 1926. A true copy of the respondent's tentative finding, being a letter addressed to the petitioners on January 23, 1934, is hereto annexed, marked Exhibit C, and made a part hereof. In such tentative finding the respondent included the alleged value of the properties transferred by the aforesaid trust agreement in the gross estate as being a transfer having been made to take effect at or after death. In the statutory notice of deficiency (Exhibit A) the respondent has included the alleged value of the properties of such trust in the decedent's gross estate for the alleged additional reason that such transfer was made in contemplation of death.

The decedent executed said trust indenture of January 7, 1927, during his lifetime when he was eighty years of age, when he was in good health, mentally and physically, with no feeling that death was near, and neither contemplation of death nor specific anticipation of death was the motive, or animating, actuating cause of the transfer. That said transfer was intended to be and was a gift inter vivos and not of a testamentary nature. That decedent's motive was to provide a specific fund for the natural recipients of his bounty and to place a large share of his assets beyond the danger of the results of his own planned speculations and to establish and protect his children.

That said transfer by such trust agreement was an irrevocable one, intended to take effect and taking effect in possession and enjoyment at the time thereof and not at or after the donor's death, and the donor did not retain any possession or enjoyment in the property or rights therein, and all economic benefits and burdens in and all control over the property passed completely from the donor at the time of the execution of said trust.

(c) The properties transferred by the aforesaid trust agreement had the values at the time of the decedent's death of the amounts set opposite the same in the list set forth in Part I of Exhibit D, hereto attached.

[fol. 6] (d) The administration of the estate has not yet been concluded. In the further administration various expenses must necessarily be incurred. The said deficiency



has been determined without any provision for the amount by which the net estate may be decreased by such expenses.

Wherefore, Petitioners pray that this Board may hear this proceeding and find:

(a) That respondent erred in increasing the values of certain stocks and bonds as set forth in paragraph 4 (a) of this petition and that such stocks and bonds had no greater value at the time of decedent's death than as set forth in paragraph 5 (a) of this petition;

(b) That the value of the properties embraced in said trust dated January 7, 1927, should be excluded from the gross estate in the computation of the net estate subject to tax, in accordance with the averments of paragraphs 4 (b) and 5 (b) hereof;

(c) That, if the value of the properties transferred by the decedent by the trust agreement dated January 7, 1927, should be held by this Board as properly includable in the gross estate then, in that event such values should not exceed those set forth in Part I of Exhibit D, made a part of this petition.

(d) That proper provision be made for expenses incurred and to be incurred in the further administration of this estate in accordance with the averments of paragraphs 4 (d) and 5 (d) hereof; and

For all such further and general relief as the facts and nature of the case may demand and as in the premises to the Board seem fit and proper.

Erl H. Ellis, 730 Equitable Building, Denver, Colorado. C. Clifton Owens, American Security Bldg., Washington, D. C.

[fol. 7] *Duly sworn to by Hugh McLean and Gertrude H. Grant. Jurats omitted in printing.*



September 13, 1934.

MT-ET-C1-1344-Colorado.

Estate of Edwin B. Hendrie.

Date of death—July 15, 1932.

The Colorado National Bank of Denver, et al., Executors,  
Denver, Colorado.

SIRS:

A deficiency of \$188,108.28 in the Federal estate tax liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver,

[fol. 9] Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully, Guy T. Helvering, Commissioner,  
(Signed) by Adelbert Christy, Acting Deputy Commissioner.

Enclosures: Statement, Waiver, Form 890.  
ATC:FCH.

The estate's protest involves the contention that the Bureau's tentative findings that a trust created by the decedent on January 7, 1927, valued at \$1,034,074.22 should be included in the gross estate as a transfer under the provisions of Section 320 (c) of the Revenue Act of 1926, was erroneous. A review of all the evidence in the record sustains the tentative finding. The Bureau has also determined that the value of the trust should be included in the gross estate for the additional reason that it was made in contemplation of death.

In view of the evidence presented by the estate showing the payment of \$51,106.86 State inheritance taxes to the State of California, credit is allowed in that amount.

The tentative findings are hereby made final as to all changes shown in the tentative letter. The following is a summary statement of the tax liability as herein determined:

	Returned	Tentatively Determined	Determined
Gross estate.....	\$928,006.08	\$2,018,912.80	\$2,018,912.80
Deductions (1926 Act).....	181,587.60	148,730.55	148,730.55
Net estate (1926 Act).....	\$776,419.08	\$1,870,182.25	\$1,870,182.25
Gross estate.....	\$928,006.08	\$2,018,912.80	\$2,018,912.80
Deductions (1932 Act).....	111,587.60	98,730.55	98,730.55
Net estate (1932 Act).....	\$836,419.08	\$1,920,182.25	\$1,920,182.25
Gross tax (1936 Act).....	\$23,085.14	\$121,816.40	\$121,816.40
Credit for State estate, inheritance, legacy or succession taxes.....	26,468.11	0.00	51,106.86
Net tax (1936 Act).....	\$6,617.03	\$121,816.40	\$70,709.54
[fol. 10]			
Total gross taxes (1926 and 1932 Acts).....	\$26,491.24	\$309,238.27	\$309,238.27
Gross tax (1926 Acts).....	33,085.14	121,816.40	121,816.40
Net additional tax.....	\$63,406.10	\$187,421.87	\$187,421.87
Net tax (1926 Act).....	6,617.03	121,816.40	70,709.54
Total net tax.....	\$70,023.13	\$309,238.27	\$258,131.41
Deficiency.....			\$188,106.26

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter if a petition is not filed with the Board of Tax Appeals \$141,762.02 of the deficiency will be assessed. As the balance of the deficiency may be eliminated by additional credit for State estate, inheritance, legacy or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of the Estate Tax Regulations 70-(1929) Edition. If, after a reasonable time the evidence is not filed, the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

The deficiency bears interest at the rate of six percent per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

#### EXHIBIT "B" TO PETITION

Memorandum of Agreement, entered into this seventh day of January, A. D. 1927, between Edwin B. Hendrie, of the City and County of Denver, State of Colorado, (hereinafter referred to as the "Donor"), and The Colorado National Bank of Denver, a national banking association doing business in the City and County of Denver, State of Colorado, (hereinafter referred to as the "Trustee"): Witnesseth:

That, Whereas, the Donor desires to create a trust for the use and benefit of certain beneficiaries hereinafter mentioned, upon the terms and conditions hereinafter set forth;

Now, Therefore, in consideration of the premises and for the purpose of accomplishing the objects hereinafter more particularly set forth, the Donor has sold, assigned, transferred, set over and delivered, and by these presents does [fol. 11] sell, assign, transfer, set over and deliver unto the said Trustee, all and singular, those certain securities and properties described as follows, to-wit:

\$46,000 face value of Fremont County, Colorado, School District No. 1 Bonds.

\$34,000 face value of Morgan County, Colorado, School District No. 3 Bonds.

\$22,000 face value of Waco Custer Ditch Company Bonds.

\$50,000 face value of Joint Stock Farm Loan Bank of Chicago, Ill., Bonds.

- \$25,000 face value of New Orleans, Texas & Mexico Railway Company Bonds.
- \$50,000 face value of The Ohio-Pennsylvania Joint Stock Land Bank of Cleveland, Ohio, Bonds.
- \$50,000 face value of Federal Land Bank of Springfield, Ill., Bonds.
- \$50,000 face value of Federal Land Bank of New Orleans, Bonds.
- \$50,000 face value of Missouri Gas & Electric Service Co. Bonds, Series A.
- \$50,000 face value of Union Pacific Railroad Company Bonds.
- \$50,000, face value of Central Power Company, Series C, Bonds.
- \$50,000 face value of Farmers Irrigation District of Scottsbluff, Nebr. Refinancing Bonds.
- \$30,000 face value of Bosworth, Chanute Building Company Bonds.

And such other securities and properties as Donor may, from time to time, see fit to deposit hereunder.

First. Said Trustee shall receive, hold, manage and control, and in its discretion improve, lease (for any period whatsoever), exchange or vary, pledge, mortgage, sell and convey all or any part of the securities or other property at any time composing the trust estate, upon such terms and conditions as it may deem proper, and no person taking any such property or securities from said Trustee by way of sale, lease, mortgage, pledge or exchange shall be required to see to the application of the purchase money, or the rents, issues, profits or proceeds of such sale, lease, mortgage, pledge or exchange, or to inquire as to the authority of the Trustee in the premises. The Trustee shall collect and receive all [fol. 12] dividends, rents, issues, profits, interest and income of the trust estate and shall invest and reinvest all or any part of the principal thereof in real, personal or mixed property, and generally manage and control all of said trust property and all investments and reinvestments thereof in its absolute discretion without limiting such investments to the classes of securities or property which are now or may hereafter be prescribed by law as those in which trust funds shall be invested, it being the intention of the Donor to confer upon the Trustee with respect to the said trust estate

all of the powers of management and control that the Donor would have had were the Donor then in the sole and absolute possession and control of the property composing said trust estate; Provided, However, that during the lifetime of the Donor all sales of securities and all reinvestments of trust funds shall be approved by the Donor.

Second. The net income from all of the trust estate shall be treated as part of the principal of said trust estate and shall be invested and reinvested as such under the terms of this Trust Agreement during the lifetime of the Donor, and after the death of the Donor the net income from all of the trust estate, or so much thereof as Gertrude Hendrie Grant daughter of the Donor may call for, shall be paid to her by the Trustee so long as she shall live, and the portion of the net income received from said trust estate after the death of the Donor that is not called for by the said Gertrude Hendrie Grant shall be treated as part of the principal of said trust estate and invested and reinvested under the terms of this agreement. And upon the death of the said Gertrude Hendrie Grant, daughter of the Donor, then said Trustee shall pay over, deliver and convey all of the then remainder of said trust estate equally to the then living children of the said Gertrude Hendrie Grant and to the descendants of any deceased child of the said Gertrude Hendrie Grant, the descendants taking per stirpes and not per capita; That is, the descendants of any deceased child of the said Gertrude Hendrie Grant collectively and equally to take the share that their parent would have received if living. And in the event the said Gertrude Hendrie Grant dies leaving no child or children, nor descendants of any deceased child surviving her, then upon the death of the said Gertrude Hendrie Grant the said Trustee shall pay over, deliver and convey all of the then trust estate to the heirs at law of the said Gertrude Hendrie Grant under the then intestate laws of the State of Colorado.

[fol. 13] Third. No title in any part of the trust estate hereby created or in the income accruing therefrom or in its accumulations, shall vest in any beneficiary hereunder during the continuance of the trust as to such beneficiary, and no beneficiary shall have the right or power to transfer, assign, anticipate or encumber his or her interest in said trust estate or the income therefrom prior to the actual distribution thereof by the Trustee to such beneficiary.



Fourth. The Trustee may employ such agents and attorneys as it may deem reasonably necessary for the proper management and protection of the trust estate and pay reasonable compensation to such agent and attorneys, and the said Trustee shall receive as its fee for collection interest, income and profits hereunder, for investing and reinvesting funds and for accounting to the beneficiaries hereunder, two per cent (2%) of the gross income collected from all securities and properties belonging or to belong to said trust estate to be deducted as said income is received, and a distribution fee of one-quarter of one per cent ( $\frac{1}{4}$  of 1%) upon the corpus of said trust estate to be paid at the time of distribution, and in the event the Trustee sees fit to invest any part of said trust estate in real estate mortgages the Trustee in addition to the foregoing fees may charge the person borrowing and retain to itself the customary commission for making loans. In case of litigation or in case the Trustee performs services of an unusual and unexpected kind other than as aforesaid, its charges for such additional services shall be reasonable and just.

Fifth. The Trustee shall use its best judgment in the selection of securities for, and in the care of properties belonging to said trust estate, but it shall not be held for any loss by reason of any mistakes or errors of judgment made by it in good faith in the execution of said trust.

Sixth. The Trustee shall have the right to determine what portion of said trust estate constitutes income and what portion corpus for income tax purposes and for all purposes of this trust, and the decision of the Trustee in this regard as well as the valuations and judgment of the Trustee in making distribution of the principal of the trust estate, which may be made either in cash or in kind as the Trustee may decide, shall be binding and conclusive upon all persons who may at any time be or become beneficiaries hereunder.

[fol. 14] Seventh. That the securities and properties belonging or to belong to the said trust estate may for convenience in transferring, be held in the name of the Trustee or its nominee, it being understood, however, that on its books and records said securities and properties shall constantly be shown to be a part of said trust estate and all funds belonging thereto may be deposited through its Trust Department with said Trustee bank.



**Eighth.** This Trust is intended to be, and by the Donor is hereby declared to be irrevocable.

In Witness Whereof, said Donor has hereunto set his hand and said Trustee has caused this instrument to be executed in duplicate by its proper officers and its corporate seal to be hereunto affixed, on the day and year first above written.

Edwin B. Hendrie. (Seal.) The Colorado National Bank of Denver, by H. Kountze, Vice-President. (Seal.)

Attest: Frank N. Bancroft, Trust Officer.

STATE OF COLORADO,

City and County of Denver, ss:

I, (Clarence J. Rogers) a Notary Public in and for said City and County, in the State aforesaid, do hereby certify that Edwin B. Hendrie who is personally known to me to be the person whose name is subscribed to the foregoing Trust Agreement, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand notarial seal this 8th day of January A. D. 1927.

(Clarence J. Rogers), Notary Public. My commission expires April 26, 1927. (Seal.)

STATE OF COLORADO,

City and County of Denver, ss:

I, Stella Busbee, a Notary Public in and for said City and County of Denver, in the State aforesaid, do hereby certify, that H. Kountze and Frank N. Bancroft, Vice-President and [fol. 15] Trust Officer, respectively of The Colorado National Bank of Denver, who are personally known to me to be the persons whose names are subscribed to the foregoing Trust Agreement appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument of writing as the free and voluntary act and deed of The Colorado National Bank of Denver as Trustee therein, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 8th day of January A. D. 1927.

(Stella Busbee), Notary Public. My commission expires February 23, 1927. (Seal.)

I, Frank N. Bancroft, Trust Officer of The Colorado National Bank of Denver, hereby certify the foregoing instrument to be a true and correct copy of the Trust Agreement between Edwin B. Hendrie and The Colorado National Bank of Denver.

Subscribed and sworn to before me, a Notary Public this — day of February, 1932.

EXHIBIT "C" TO PETITION

January 23, 1934.

MT-ET 1344-Colorado.

Estate of Edwin B. Hendrie.

Date of death July 15, 1932.

The Colorado National Bank of Denver, et al., Executor,  
Denver, Colorado.

Sms:

A deficiency in the Federal estate tax liability of the above-named estate is hereby proposed as the result of an examination of the return, Form 706, the revenue agent's report, and other data on file.

If you acquiesce in the proposed deficiency you are requested to execute and forward the enclosed Form 890, waiving the restrictions against the immediate assessment and collection of the deficiency. The submission of the waiver will expedite the closing of this case and will prevent the accumulation of interest charges, as the interest period terminates thirty days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file [fol. 16] a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

The issuance of this letter does not permit a petition to the United States Board of Tax Appeals, as the deficiency

is only tentatively determined. However, a protest against the proposed deficiency may be filed with the Commissioner of Internal Revenue within thirty days from the date of this letter. Every protest should be sworn to and filed in duplicate. If a hearing is desired, request therefor should be made at the time the protest is filed. Any additional evidence relied upon should accompany the protest.

If the tax cannot be finally determined on the basis of a waiver submitted or if a protest is not filed within the time allowed by this letter, a final determination of the tax will thereafter be made and you will be notified by registered mail of any deficiency in accordance with Section 308 (a) of the Revenue Act of 1926.

Examination of the return discloses the following:

	Returned	Tentatively Determined
Gross estate.....	\$323,006.63	\$2,013,212.80
Deductions (1926 Act).....	181,587.60	142,730.55
Net Estate (1926 Act).....	\$776,419.03	\$1,570,182.25
Gross estate.....	\$323,006.63	\$2,013,212.80
Deductions (1922 Act).....	111,587.60	98,730.55
Net estate (1922 Act).....	\$226,419.03	\$1,080,182.35
1. Gross tax (1926 Act).....	\$33,085.14	\$121,816.40
2. Credit for gift tax.....	0.00	0.00
3. Gross tax less gift tax credit.....	\$33,085.14	\$121,816.40
4. Credit for estate or inheritance tax.....	26,468.11	0.00
5. Net tax (1926 Act).....	\$6,617.03	\$121,816.40
6. Total gross taxes (1926 and 1922 Acts).....	\$26,491.24	\$300,233.27
7. Gross tax (1926 Act).....	33,085.14	121,816.40
8. Gross additional tax.....	\$63,406.10	\$187,421.87
9. Credit for gift tax.....	0.00	0.00
10. Net additional tax.....	63,406.10	187,421.87
11. Total net tax..... (fol. 17)	\$70,023.13	\$300,233.27
Amount assessed as de- ficiency pursuant to waiver.....	0.00	70,023.13
Deficiency.....		\$339,215.14

The deficiency bears interest at the rate of 6 per centum per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

The deficiency results from the following adjustments:

Gross Estate		
Stocks and Bonds	Returned	Tentatively Determined
Item 1.....	\$250.00	\$2,500.00
Item 2.....	2,020.00	9,570.00
Item 6.....	1,700.00	1,557.50
Item 10.....	6,525.00	6,712.50
Item 11.....	4,000.00	5,000.00
Item 14.....	2,000.00	3,000.00
Item 15.....	3,187.50	3,750.00
Item 16.....	3,167.50	3,250.00
Item 17.....	7,800.00	8,000.00
Item 18.....	9,562.50	9,937.50
Item 19.....	178,500.00	210,000.00
Item 20.....	1,937.50	1,937.50
Item 23.....	5,000.00	5,125.00
Item 26.....	1,250.00	1,312.50
Item 27.....	2,552.50	2,625.00
Item 29.....	3,000.00	2,562.50
Item 30.....	11,000.00	11,206.25
Item 32.....	24,000.00	24,800.00
Item 35.....	812.50	875.00
Item 36.....	375.00	410.00
Item 38.....	6,800.00	6,975.00
Item 39.....	20,500.00	25,500.00
Dividend on Item 39.....	0.00	750.00
Item 42.....	6,300.00	5,850.00
Item 43.....	5,062.50	5,187.50
Item 45.....	4,000.00	4,500.00
Item 50.....	750.00	625.00
Item 51.....	18.75	20.00
[fol. 18]		
Item 53.....	4,200.00	4,400.00
Item 55.....	4,000.00	4,250.00
Item 58.....	5,471.87	5,536.25
Item 60.....	1,200.00	1,312.50
Item 62.....	1.88	2.00
Item 64.....	94.00	93.00
Mortgages, Notes, Cash and Insurance		
Item 5.....	1,700.00	3,408.50

## Gross Estate—Continued

Tentatively  
Determined

## Transfers

Returned

The value of the following described property transferred by the decedent prior to death is included in the gross estate under the provisions of Section 302 (c) of the Revenue Act of 1926 as having been made to take effect at or after death.

Trust of January 7, 1927..... 0.00 1,034,074.22

## Deductions

Tentatively  
Determined

Returned

Funeral expenses.....	\$875.00	\$905.50
Executors' commissions.....	30,000.00	27,500.00
Attorneys' fees.....	10,000.00	25,000.00
Miscellaneous administration expenses.....	400.00	200.00
Debts of decedent.....	5,356.55	5,883.10

To balance..... 1,093,763.17

"Funeral expenses" are deducted in the amount paid.

"Executors' commissions" and "Attorneys' fees" are deducted in the amounts which have been or will be paid.

"Miscellaneous administration expenses" are deducted in the amount which appears to be correct.

Item 7 under "Debts of decedent" is deducted in the amount of \$2,559.55, which is the total amount of personal taxes paid during the years 1931 and 1932.

## Credit

No credit is allowed for State estate, inheritance, legacy, or succession taxes, as the evidence required by Article 9 of [fol. 19] Regulations 70 (1929 edition) has not been submitted. Please advise when the credit evidence may be expected.

If the full 80% credit is allowed, the net deficiency will be \$141,762.02. Execution of the enclosed waiver as to that amount will enable the Bureau to assess the full amount of the probable net tax and expedite the closing of the case.

Respectfully, (Signed) Adelbert Christy, Acting  
Deputy Commissioner.

GCW:mab.

Encl.—Waiver.



## EXHIBIT "D" TO PARTITION

## Part I

Assets of Trust Under Agreement with E. B. Handrie as of July 15, 1932

Par Value	Asset	Market	Principal	Accrued Income	Total
(1)	Clark County, Idaho, Highway Dist. 5 1/4% Bonds, due 1/1/48 Interest pble. Jan. & July 1	65	\$32,500.00	\$111.81	\$32,611.81
(2) 50,000.	Federal Land Bank of New Orleans 4 1/4% Bonds, opt. 1933, due 1933 interest pble. Jan. & July 1	88 1/4	44,125.00	92.36	44,217.36
(3) 50,000.	Federal Land Bank of Springfield 4 1/4% bonds, opt. 1934, due 1934 interest pble. Jan. & July 1	88 1/4	44,125.00	92.36	44,217.36
(4) 40,000.	Imperial Irrigation District Issue No. 4 6% Bonds, due serially 7/1/41 to 7/1/55; Interest pble. Jan. & July 1	34	11,760.00	default	11,760.00
(5) 10,000.	Kansas City Terminal Company 4% First Mfg. Bonds, due 1/1/50 Interest pble. Jan. & July 1	82 1/4	8,260.00	15.56	8,275.56
(fol. 20)					
(6) 34,000.	Morgan County, Colorado S. D. No. 3 4 1/4% Bonds, due serially 1/1/52 to 1/1/57; Interest pble. Jan. & July 1	90	33,660.00	56.19	33,716.19
(7) 102,000.	Farmers Irrigation District of Scottsbluff County, Nebraska 6% Ref. Bonds, due serially 1/1/53 to 1/1/71; Interest pble. Jan. & July 1	25	25,500.00	228.00	25,728.00
(8) 50,000.	Maricopa County, Arizona, Glendale Union High School 4 1/4% Bonds, due serially 7/15/39 ... 48 Interest pble. Jan. & July 15	90	40,000.00	0.	40,000.00
(9) 61,000.	Maricopa County, Arizona Tolleson Union High School 4 1/4% Bonds, due serially 7/15/40 ... 47 Interest pble. Jan. & July 15	75	45,750.00	0.	45,750.00



Exhibit "D" to Petition—Part I—Assets of Trust Under Agreement with E. B. Hendrie as of July 15, 1932—Continued

Par Value (10)	Asset	Market	Principal	Accrued Income	Total
25,000.	Republic of Chile, External S. F. 6% Bonds, due 2/1/51 Interest pble. Feb. & Aug. 1	7½	1,937.50	default	1,937.50
(11) 50,000.	Denver & Rio Grande Western R. R. Co. Gen. Mtge. S. F. 5% Bonds, due 8/1/55; Interest payable Feb. & Aug. 1	6½	3,250.00	1,138.89	4,388.89
(12) 25,000.	Martin, Texas, Sewerage Disposal Plant 5% Bonds, opt. 2/1/38, due 2/1/59; Interest payable Feb. & Aug. 1	80	20,000.00	559.45	20,559.45
(13) 50,000.	Middle Rio Grande Conservancy Dist. 5½% Bonds, due 8/1/60 70 Interest pble. Feb. & Aug. 1	70	35,000.00	1,252.78	36,252.78
(14) 25,000.	Cameron County, Texas, Road Series D 5% Bonds, due 2/15/48 Interest pble. Feb. & Aug. 15	33	8,250.00	520.85	8,770.85
[Vol. 21]					
(15) 50,000.	Joint Stock Land Bank of Cleveland 5% bonds, opt. 1934, due 3/1/54; Interest pble. March and Sept. 1	40	20,000.00	930.56	20,930.56
(16) 50,000.	Missouri Gas & Electric Service Co. First Mtge. Ref. Series A, 6% Bonds, due 9/1/44; Interest pble. March and Sept. 1	46	23,000.00	1,116.77	24,116.77
(17) 24,250.	Pettibone Mulliken Company First Mtge. S. F. 6% Bonds, due 9/1/48; Int. pble. Mar. & Sept. 1	5	1,212.50	default	1,212.50
(18) 50,000.	Union Pacific R. R. Company First Lien Ref. 5% Bonds, due 6/1/2008; Interest pble. March and Sept. 1	90	45,000.00	930.56	45,930.56
(19) 50,000.	Chicago, Milwaukee & Gary Ry. Co. First Mtge. 5% Bonds, due 4/1/48; Interest pble. April & Oct. 1	40	20,000.00	722.22	20,722.22

Exhibit "D" to Petition—Part I—Assets of Trust Under Agreement with E. I.  
Hendrie as of July 15, 1932—Continued

Par Value	Asset	Market	Principal	Accrued Income	Total
(20) 46,000.	Fremont County, Col- orado S. D. No. 143½% Bonds, opt. 1939, due 4/1/54; Interest pble. April & Oct. 1	100	46,000.00	631.32	46,631.2
(21) 10,000.	New Mexico State High- way Debenture Series Q35 6% Bonds, due 4/1/40 Interest pble. April & Oct. 1	95	9,500.00	173.23	9,673.2
(22) 25,000.	New Orleans, Texas & Mexico Ry. Co. First Mtg. Series B 5% Bonds due 4/1/54; Inter- est pble. April & Oct. 1	23½	5,875.00	361.11	4,236.11
(23) 50,000	New York Dock Com- pany 6% Serial Bonds, due 4/1/38; Interest pble. Apr. & Oct. 1	38	19,000.00	722.22	19,722.2
[fol. 22]					
(24) 25,000	Southern Pacific-Golden Gate Ferries First Mtge. S. F. 5½% Bonds, due 4/1/49; Interest pble. April & Oct. 1	62	15,500.00	397.22	15,897.22
(25) 30,500.	Waco Custer Ditch Company, First Mtge. 6% Bonds, due serially 10/1/35 . . . 50; Interest pble. April & Oct. 1	50	15,250.00	528.67	15,778.67
(26) 50,000	Wisconsin Central Ry. Co. First and Ref. Mtge. 4% Bonds, due 4/1/50; interest pble. April & Oct. 1	81½	40,750.00	577.78	41,327.78
(27) 25,000.	Mortgage Bank of Chile, Guaranteed S. F. 6% Bonds, due 4/30/61; Int. pble. April 30 & Oct. 31	8	2,000.00	default	2,000.00
(28) 50,000	First Trust Joint Stock Stock Land Bank of Chicago 4½% Bonds, due 5/1/54; opt. 1934; Interest payable May and Nov. 1	53	26,500.00	488.19	26,988.19
(29) 50,000	Bijou Irrigation Dis- trict Ref. series 26, 27 & 28, 6% Bonds, due	50	25,000.00	default	25,000.00

Exhibit "D" to Petition—Part I—Assets of Trust Under Agreement with E. B. Hendrie as of July 15, 1932—Continued

Par value	Asset	Market	Principal	Accrued Income	Total
(0)	serially 12/1/48 . . . 50 interest pble. June & Dec. 1				
1,000	Colorado State High- way 5% Bonds opt. 1932, due 6/1/32; In- terest pble. June & Dec. 1	100	25,000.00	152.78	25,152.78
(1)	Holbrook Irrigation Dis- trict Refunding 6% Bonds, due 12/1/43; In- terest pble. June & Dec. 1	35	24,500.00	default	24,500.00
(2)	Kansas City, Kansas, General Improvement Series P, 4½% Bonds due 6/1/42; Interest payable June and Dec. 1	98	14,700.00	82.50	14,782.50
(3)	Salt Lake County, 100½ Utah, Tax 5% Bonds, due 12/31/32 Interest payable Dec. 31	100½	10,012.50	267.04	10,279.54
(4)	General Electric Co. of Germany S. F. Deben- ture 6% Bonds, due 5/1/48; Interest paya- ble May and Novem- ber 1	32½	3,287.50	123.33	3,410.83
(5)	Pacific Gas & Electric Co. Series A. Gen. & Ref. Mtge. 5% Bonds, due 1/1/42	100½	10,012.50	19.44	10,031.94
(6)	German Government International Loan 5½% Bonds, due 6/1/35; Interest pble. June & Dec. 1	44½	22,375.00	336.11	22,711.11
(7)	Westphalia United Elec- tric Power Company First Mtge S. F. Series A 6% Bonds, due 1/ 1/53; Interest pble. Jan. & July 1	22½	2,262.50	23.33	2,285.83
(8)	Brooklyn Manhattan Transit Corp. Preferred \$6.00 Series A. Stock	48½	48,625.00		48,625.00
(9)	Neptune Meter Com- pany, preferred 8% Stock, \$100 par value	40	20,000.00		20,000.00

Exhibit "D" to Petition—Part I—Assets of Trust Under Agreement with E. I. Hendrie as of July 15, 1932—Continued

Par Value	Asset	Market	Principal	Accrued Income	Total
(40) 300 shares	Niagara Hudson Power Company Common Stock, \$15.00 par value	3 $\frac{1}{4}$	4,187.50		4,187.50
(41) 500 shares	Pennroad Corporation, Capital Stock, no par value	1 $\frac{1}{4}$	687.50		687.50
(42) 1,000 shares	Chicago, Milwaukee, St. Paul & Pacific R. R. Co. Preferred Stock \$100 par value	1 $\frac{1}{4}$	1,800.00		1,800.00
(43) 500 shares	Erie Railroad Company, Common Stock, \$100 par value stock	3 $\frac{1}{4}$	1,750.00		1,750.00
(44) 500 shares	Erie Railroad Company, First Preferred, \$100 par value stock	4	2,000.00		2,000.00
[Col. 24]					
(45) 1,500 shares	Pennsylvania Railroad Company Capital Stock, \$50 par value	8	12,000.00		12,000.00
(46) 1,000 shares	Homestake Mining Company, Capital Stock, \$100 par value	123 $\frac{1}{4}$	122,875.00		122,875.00
(47) \$17,000	McFarlane Eggers Realty Co. 6 $\frac{1}{4}$ % note, due 10/18/38; Interest payable April & Oct. 18	100	17,000.00	\$346.50	17,346.50
(48)	Pettibone Muliken Company Common Stock Purchase Warrants				
(49)	Russian Bonds				
	Cash		21,590.82		21,590.82
Totals.....			\$1,032,560.82	\$12,919.00	\$1,045,479.82

## Part II.

Differences between Colorado National Bank List of Assets  
and that recommended by the Government Examiner  
in letter of December 15, 1933.

Note: Increase denotes C. N. B. list exceeds government list;  
Decrease denotes C. N. B. list is less than government list.

Item	Principal		Accrued Interest	
	Increase	Decrease	Increase	Decrease
(1)				\$7.98
(2)				6.60
(3)				6.60
(4)				122.50
(5)				9.44
(6)				4.02
(7)				17.00
(8)				1,187.50
(9)				1,448.75
(10)				687.50
(11)				6.93
(12)				3.58
(13)			\$92.35	
(15)				6.93
[fol. 25]				
(16)				8.23
(17)				551.25
(18)				6.93
(19)				6.94
(20)				6.06
(21)				1.77
(22)				3.48
(23)				6.94
(24)				3.81
(25)				5.08
(26)				5.56
(27)				437.50
(28)	\$17,000.00			6.38
(29)				375.00
(30)				3.47
(31)				525.00
(32)				1.87
(33)				3.75
(34)				1.67
(35)				1.39
(36)				7.64
(37)				1.67
	<u>\$17,000.00</u>		<u>\$92.35</u>	<u>\$5,486.72</u>
				<u>-92.35</u>
Net.....	\$17,000.00			\$5,394.37
	<u>-5,394.37</u>			

Total Increase \$11,405.63



### Explanation of Above Differences

Item No. 28—In the list which was formerly given the government by the bank, this security was listed as Chicago Joint Stock Land Bank and was quoted at 19. These bonds were thus incorrectly described as they should have been obligations of the First Trust Joint Stock Land Bank of Chicago. Quotation for these bonds was given to us by Boettcher Newton and Company to be 51 bid—55 ask. On this basis we have used a market value of 53.

[fol. 26] Item No. 4—The Government list figured accrued interest on these bonds. Since the July 1, 1932 coupon was not paid, the quotation was at a flat price and no accrued interest should have been computed.

Item No. 8 & Item No. 9—The interest upon these two issues was due and paid July 15, 1932. The cash received from these coupons is included in the total cash amounting to \$21,590.82. Therefore the accrued interest should not be included in these two issues.

Item No. 10—These bonds of the Republic of Chile went into default August 1, 1931 and so are quoted at the flat price. Accrued interest should not be included.

Item No. 13—Our computation of accrued interest and that of the government do not agree. We believe that their figure is given in error.

Item No. 17—These bonds of Pettibone Mulliken Company went into default September 1, 1931 and so are quoted at the flat price. Accrued interest should not be included.

Item No. 27—These bonds of the Mortgage Bank of Chile went into default October 1, 1931 and so are quoted at the flat price. Accrued interest should not be included.

Item No. 29—These bonds of Bijon Irrigation District went into default June 1, 1932 and so are quoted at the flat price. Accrued interest should not be included.

Item No. 31—These bonds of Holbrook Irrigation District went into default June 1, 1932 and so are quoted at the flat price. Accrued interest should not be included.

The small differences remaining in accrued interest on the two lists are accounted for by the fact that the govern-

ment figured one more day's interest on all the items than the bank did. For example, on the first item, \$50,000.00 Clark County, Idaho bonds upon which interest was paid to July 1, 1932, they computed fifteen days accrued interest. This is contrary to the usual custom of figuring fourteen days interest from July 1st to July 15th. We believe the government is in error on all these small differences.

[fol. 27] BEFORE UNITED STATES BOARD OF TAX APPEALS  
ANSWER—Filed January 30, 1935

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, in answer to the petition of the above-named taxpayers, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition:

3. Admits so much of paragraph 3 of the petition as alleges that the taxes in controversy are estate taxes for the Estate of Edwin B. Hendrie, and denies all other allegations contained in said paragraph.

4. Denies that the respondent, in determining the deficiency tax, committed errors as alleged in paragraph 4 of the petition.

5. Admits the allegations contained in the first subdivision of paragraph 5 of the petition, beginning "Generally."

(a) Denies the allegations contained in (a) of paragraph 6 of the petition.

(b) Admits so much of subdivision (b) of paragraph 5 of the petition as alleges that the respondent, in the notice of deficiency, (Exhibit A, petition), asserts he sustains the tentative finding that the properties which were transferred by the decedent by the trust agreement of January 7, 1927 (Exhibit B, petition), should be included in the gross estate as a transfer under the provisions of Section 302 (c) of the Revenue Act of 1926; that a true copy of the respondent's tentative finding, being a letter addressed to the petitioners on January 23, 1934, is annexed to the petition and marked Exhibit C, and made a part thereof; that in such tentative

finding the respondent included the value of the properties transferred by the aforesaid trust agreement in the gross estate as being a transfer made to take effect at or after death; that in the statutory notice of deficiency (Exhibit A) the respondent has included the value of the properties of such trust in the decedent's gross estate for the additional reason that such transfer was made in contemplation of death; that the decedent executed said trust indenture of January 7, 1927, during his lifetime, when he was eighty years of age; and denies all other allegations contained in [fol. 28] said subdivision (b) of paragraph 5 of the petition.

(c) and (d) Denies the allegations contained in subdivisions (c) and (d) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore it is prayed that the determination of the Commissioner be approved.

(Signed) Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue. Of counsel: Frank T. Horner, Special Attorney, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

#### MEMORANDUM OPINION

MURDOCK: The Commissioner determined a deficiency in estate tax of \$188,108.28. The only issue left for decision by the Board is raised by the petitioners' assignment that the Commissioner erred in including in the decedent's gross estate properties which he had placed in trust on January 7, 1927. The facts have been stipulated. The Commissioner determined that the property placed in trust was properly a part of the gross estate of the decedent under section 302(c) of the Revenue Act of 1926 because the transfer to the trust was made in contemplation of the death of the donor and was made to take effect in possession or enjoyment at or after his death. Counsel for the respondent argues in his brief only that the transfer was made in contemplation of death.

The decedent, Edwin B. Hendrie, died on July 15, 1932 at the age of 85 years and six months. He established a trust on January 7, 1927 when he was 80 years of age. He was then in good health. The trust was irrevocable. The trust instrument provided that the income of the trust should be accumulated during the lifetime of the donor and added to the corpus, "after the death of the Donor the net income from all of the trust estate, or so much thereof as Gertrude Hendrie Grant, daughter of the Donor may call for, shall be paid to her by the Trustee so long as she shall live" while that not called for should be added to the [fol. 29] corpus, and the corpus was to go to the children of Gertrude Hendrie Grant at her death. The trust contained a provision against anticipation by any beneficiary.

The decedent discussed with the trust officer of a bank, in the latter part of 1926, the purposes and details of the trust which he proposed to establish. He said he wanted to transfer about one-third of his assets in the interest of his daughter and her heirs so that whatever might happen to his own financial affairs in the future, those persons would be provided for. He said he desired to retain for himself his more speculative securities and to feel free to speculate with that property during the rest of his life, but to put the other one-third beyond his own reach and risk. He said he desired and intended to "play on the market" to a greater extent and in a more speculative way for the remainder of his life. The only evidence that the daughter or her husband ever knew of the trust is a statement which the decedent made in 1930 to the husband that his (Hendrie's) daughter and grandchildren would be adequately provided for, in the event of his death, through the medium of a trust which he had created and which would not be affected by his operations on the stock market. It does not appear that the daughter knew the details of the trust prior to her father's death.

The decedent's will was dated January 26, 1925. It provided that the bulk of his estate should be placed in trust for the benefit of his daughter and her children with remainders to the children.

The petitioners have the burden of proof to show that the transfer was not made in contemplation of death within the meaning of section 302(c). They recognize that the determination of the Commissioner is presumed to be correct and argue that the evidence shows affirmatively that

the dominant motive in the mind of the donor was connected with life, not with the thought of death. Their point is that he made the transfer so that he would be free to speculate on the stock market for the rest of his life without fear that loss of his fortune would leave nothing for his daughter and her children. They point out that the donor made a complete gift and retained no possession or enjoyment to himself. They cite and rely upon *Shukert v. Allen*, 273 U. S. 545; *McCormick v. Burnet*, 283 U. S. 784; *St. Louis Union Trust Co. v. Becker*, 76 Fed. (2d) 851, affirmed 296 U. S. 48; *Reinecke v. Northern Trust Co.*, 278 U. S. 339; [fol. 30] *Klein v. United States*, 283 U. S. 231, among others. The Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were to receive nothing until after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death. We think the transfer was not made in contemplation of death within the meaning of the statute as explained in *United States v. Wells*, 283 U. S. 102. Principles announced in the cases above listed control this case which is not distinguishable from one or more of those cases where, as here, income was to be accumulated until after the death of the donor. Therefore, on this point we hold for the petitioners.

Decision will be entered under Rule 50.

Entered Sept. 19, 1936.

#### BEFORE UNITED STATES BOARD OF TAX APPEALS

##### DECISION

Pursuant to the Board's Memorandum Opinion entered September 19, 1936, the respondent, on October 13, 1936, filed a proposed recomputation and notice of settlement. On October 24, 1936, the petitioner filed a notice of acquiescence to the recomputation filed by the respondent. Therefore, it is,

Ordered and Decided, that there is a deficiency in estate tax in the amount of \$5,283.19.

(Signed) J. E. Murdock, Member, United States Board of Tax Appeals.

Entered Nov. 9, 1936.



# IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR—Filed  
January 30, 1937

To the Honorable Judges of the United States Circuit Court  
of Appeals for the Tenth Circuit:

New comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, Herman Oliphant, General Counsel for the Department of the Treasury, and John M. Morawski, [fol. 31] Special Attorney, Bureau of Internal Revenue, and respectfully shows:

## I

The petitioner on review (hereinafter referred to as the Commissioner) is the duly authorized, qualified and acting Commissioner of Internal Revenue of the United States. The respondents on review (hereinafter referred to as the taxpayers) are executors of the Estate of Edwin B. Hendrie, deceased. The principal place of business of The Colorado National Bank of Denver, and the residence of Gertrude Hendrie Grant, are Denver, Colorado. Taxpayers filed an estate tax return with the Collector of Internal Revenue for the District of Colorado, whose office is located in Denver, Colorado. The office of said Collector of Internal Revenue is located within the judicial district of the United States Circuit Court of Appeals for the Tenth Circuit.

## II

The Commissioner determined a deficiency in the estate tax of the taxpayers in the amount of \$188,108.28, and on September 13, 1934, pursuant to the provisions of the Revenue Acts, sent to the taxpayers by registered mail a notice of said deficiency. Thereafter, the taxpayers filed an appeal from the said notice of deficiency with the United States Board of Tax Appeals.

The case was submitted to the Board on the pleadings and a stipulation of facts including certain exhibits. On September 19, 1936, the Board entered its memorandum opinion in said appeal.

On November 9, 1936, the Board entered its decision and final order of redetermination in said appeal wherein and whereby the Board ordered and decided that there was a deficiency in estate tax in the amount of only \$5,283.19.

## III

The decedent died in 1932 at the age of 85 years and 6 months. On January 7, 1927, at the age of 80 the decedent, apparently in good health, executed a trust instrument which was irrevocable and which provided for the accumulation of income and treating it as a part of the corpus during the lifetime of the donor, and after the death of the donor the [fol. 33] net income, or as much of it as she might care for, was to be paid to the decedent's daughter during her lifetime and upon her death the principal was to be divided equally among her children, the descendants of the dead child taking the parent's share, and in case she left no issue, then to her heirs. No title was to vest in the beneficiary until actual distribution. The trust created on January 7, 1927, was substantially in form and effect somewhat similar to provisions in the will made by the decedent in 1925.

After the death of the decedent the executors filed an estate tax return in which the value of the trust created January 7, 1927, was not included as a part of the decedent's gross estate. The Commissioner in his notice of deficiency mailed September 13, 1934, determined that the value of said trust should have been included in the decedent's gross estate on the ground that the transfer was made in contemplation of or intended to take effect in possession or enjoyment at or after his death within the meaning of Section 302 (c) of the Revenue Act of 1926, 44 Stat. 9, 70, ch. 27 (U. S. C. Title 26, Sec. 411).

It is the position of the Commissioner that the dominant purpose of making the transfer was one associated with death rather than with life, and that the transfer was therefore made in contemplation of death within the purview of the statute. The Board, however, held that the transfer was not made in contemplation of death within the meaning of the statute.

## IV

The Commissioner says that in the record and proceedings before the Board of Tax Appeals, and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals, manifest errors occurred and intervened to the prejudice of the Commissioner, and the Commissioner assigns the following errors and each one of

them he avers occurred in the record proceedings, decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

1. The Board erred in holding and deciding that there is a deficiency in estate tax of only \$5,283.19.

2. The Board erred in failing to hold and decide that there is a deficiency in estate tax in the amount of \$184,958.28.

[fol. 33] 3. The Board erred in holding and deciding that the transfer effected by declaration of trust dated January 7, 1927, was not made in contemplation of or intended to take effect in possession or enjoyment at or after decedent's death within the meaning of Section 302 (c) of the Revenue Act of 1926.

4. The Board erred in failing to hold and decide that the transfer effected by declaration of trust dated January 7, 1927, was made in contemplation of or intended to take effect in possession or enjoyment at or after decedent's death within the meaning of Section 302 (c) of the Revenue Act of 1926.

5. The Board erred in that its findings of fact are not supported by the evidence.

6. The Board erred in that its decision is not supported by the evidence and is contrary to law.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Tenth Circuit and that a transcript of the record be prepared in accordance with the law and the rules of said Court and transmitted to the clerk of said Court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) James W. Morris, Assistant Attorney General.  
(Signed) Herman Oliphant, General Counsel for the Department of the Treasury. Of Counsel: Dewitt M. Evans, John M. Morawski, Special Attorneys Bureau of Internal Revenue.

*Duly sworn to by John M. Morawski. Jurat omitted in printing.*

## [fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS

NOTICE OF FILING PETITION FOR REVIEW—Filed February 5, 1937

To The Colorado National Bank of Denver, Champa and Seventeenth Streets, Denver, Colorado.

Mrs. Gertrude Hendrie Grant, 7029 East Twelfth Avenue, Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 30th day of January, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 30th day of January, 1937.

(Sgd.) Herman Oliphant, General Counsel for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 2nd day of February, 1937.

The Colorado National Bank of Denver, Co-Executor, (Sgd.) by Charles A. Baer, Estate Division. (Sgd.) Gertrude Hendrie Grant, by W. W. Grant, Attorney-in-fact, Respondents on Review.

## [fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS

NOTICE OF FILING PETITION FOR REVIEW—Filed February 5, 1937

To Erl H. Ellis, 750 Equitable Building, Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 30th day of January, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit, of the deci-

sion of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 30th day of January, 1937.

(Sgd.) Herman Oliphant, General Counsel for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 2nd day of February, 1937.

(Sgd.) Erl H. Ellis, Attorney for Respondents on Review.

#### BEFORE UNITED STATES BOARD OF TAX APPEALS

#### STIPULATION OF FACTS—Filed May 19, 1936

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts shall be taken and deemed to be true and may be taken and accepted by the United States Board of Tax Appeals as proved by the evidence herein contained, provided, however, that nothing herein contained shall be so construed as to limit the right of either of the parties to offer further and additional testimony not at variance with the facts herein stipulated at any hearing of the above entitled appeal, if, and in the event this Board should deny the petitioner's motion to submit this appeal to the Board for decision on the basis of the within agreed to facts and without a formal hearing:

1. Edwin B. Hendrie, a resident of Denver, Colorado, died on July 15, 1932. He was born January 10, 1847.

[fol. 36] 2. Gertrude Hendrie Grant is now and has been continuously since August 8, 1932, a duly qualified and acting executor of the Estate of Edwin B. Hendrie, deceased.

3. The Colorado National Bank of Denver, Denver, Colorado, is now and has been continuously since August 8, 1932, a duly appointed, qualified and acting executor of the Estate of Edwin B. Hendrie, deceased.



4. Gertrude Hendrie Grant and The Colorado National Bank of Denver are now and at all times have been the only duly appointed, qualified and acting executors of the Estate of Edwin B. Hendrie, deceased.

5. The executors of the Estate of Edwin B. Hendrie, deceased, on June 2, 1933, filed a Federal estate tax return with the Collector of Internal Revenue at Denver, Colorado, reporting thereing a gross estate of \$938,006.68, deductions computed under the Revenue Act of 1926 of \$161,587.60, deductions under the Revenue Act of 1932 of \$111,587.60, a gross tax liability under the Revenue Act of 1926 of \$33,085.14 against which was claimed a credit for State estate, inheritance, legacy or succession taxes of 80 per cent thereof, or \$26,468.11, a net tax liability under the Revenue Act of 1926 of \$6,617.03, a net tax liability under the Revenue Act of 1932 of \$63,406.10, and a total net tax liability of \$70,023.13.

6. The total net tax liability of \$70,023.13 reported in the Federal estate tax return filed by the executors of the Estate of Edwin B. Hendrie, deceased, was paid to the Collector of Internal Revenue at Denver, Colorado, in two installments on July 15, 1933, and on December 4, 1933.

7. The Commissioner of Internal Revenue on September 13, 1934 mailed a notice of deficiency in estate tax against the Estate of Edwin B. Hendrie, deceased, to the executors of that estate. A true and ~~and~~ correct copy of that notice of deficiency is hereto annexed and marked Exhibit A. A true and correct copy of the tentative finding of the Commissioner of Internal Revenue referred to in the notice of deficiency is annexed hereto and marked Exhibit B.

8. In the Commissioner's notice of deficiency of estate tax against the Estate of Edwin B. Hendrie mailed on September 13, 1934, a deficiency of \$188,108.28 was claimed after allowing a credit for State inheritance, estate, legacy or [fol. 37] succession taxes paid of \$51,106.86 against the Federal estate tax liability determined by him under the provisions of the Revenue Act of 1926.

9(a). In determining the value of the gross estate of Edwin B. Hendrie, deceased, the Commissioner of Internal Revenue in the notice of deficiency mailed on September 13, 1934, included therein an amount of \$1,034,074.22, repre-

senting the value at the date of Edwin B. Hendrie's death of certain properties transferred in trust by Edwin B. Hendrie on January 7, 1927, which such transfer in trust is more specifically described in the next succeeding paragraph.

9(b) ~~On~~ January 7, 1927, the decedent, Edwin B. Hendrie, made and executed an instrument in writing wherein and whereby he transferred to The Colorado National Bank of Denver, as Trustee, certain securities in trust subject to the provisions therein contained. A full, true and correct copy of the said instrument is hereto annexed and marked Exhibit C.

9(c). The Colorado National Bank of Denver accepted the trust as trustee on January 7, 1927, and has continuously from then to the present date acted as such trustee and pursuant to the terms of the trust instrument dated January 7, 1927.

9(d). The petitioners in reporting the gross estate in the Federal estate tax return filed as set out in the within paragraph numbered five did not include therein any of the properties included in the trust mentioned in the preceding paragraphs of this stipulation.

10. It is hereby stipulated and agreed by and between the parties hereto that if Doctor J. E. Kinney, 606 Metropolitan Building, Denver, Colorado, were called to testify as a witness in a formal hearing of this appeal before the United States Board of Tax Appeals he would give the identical testimony set forth in Exhibit D hereunto annexed, and it is further stipulated and agreed that such testimony may be received by this Board and shall be given the same force and effect as if Doctor Kinney were present at such a hearing and after having been first duly sworn then and there gave such testimony.

11. It is hereby stipulated and agreed by and between the parties hereto that if Mr. Frank N. Bancroft, University Building, Denver, Colorado, were called to testify as a witness in a formal hearing of this appeal before the United [fol. 38] States Board of Tax Appeals he would give the identical testimony set forth in Exhibit E hereunto annexed, and it is further stipulated and agreed that such testimony may be received by this Board and shall be given

the same force and effect as if Mr. Frank Bancroft were present at such a hearing and after having first been duly sworn then and there gave such testimony.

12. It is hereby stipulated and agreed by and between the parties hereto that if Mr. W. W. Grant, 730 Equitable Building, Denver, Colorado, were called to testify as a witness in a formal hearing of this appeal before the United States Board of Tax Appeals he would give the identical testimony set forth in Exhibit F hereunto annexed, and it is further stipulated and agreed that such testimony may be received by this Board and shall be given the same force and effect as if Mr. W. W. Grant were present at such a hearing and after having been first duly sworn then and there gave such testimony.

13. It is hereby stipulated and agreed that the petitioners are entitled to a deduction in the amount of \$15,000.00, representing attorney's fees, in addition to the amount of \$10,000.00 allowed by the respondent as a deduction for attorneys' fees in the administration of the decedent's estate in the respondent's notice of deficiency.

14. It is hereby stipulated and agreed that the attached Exhibit G is a true and correct copy of the last will and testament of Edwin B. Hendrie, deceased, which said last will and testament has been duly admitted to probate by the County Court, City and County of Denver, Colorado, having jurisdiction in the premises.

It is hereby stipulated and agreed that the hereunto attached exhibits A to G, both inclusive, and hereinabove referred to are by this reference incorporated herein, made a part hereof, and shall be considered as introduced in evidence herein.

C. Clifton Owens, Counsel for Petitioners. (Signed)  
Herman Oliphant, General Counsel for the Dept.  
of the Treasurer, Counsel for Respondent.

[fol. 39] [Exhibit A, notice of deficiency dated Sept. 13, 1934, is the same as Exhibit A to the petition, for which reason it is omitted from the printed record. See side folio 8.]

[Exhibit B, tentative findings of the commissioner, dated Jan. 23, 1934, is the same as Exhibit C to the complaint, for which reason it is omitted from the printed record. See side folio 15.]

[Exhibit C, Memorandum of Agreement, is the same as Exhibit B to the complaint, for which reason it is omitted from the printed record. See side folio 10.]

### EXHIBIT "D" TO STIPULATION OF FACTS

#### Affidavit of Dr. J. E. Kinney

I hereby state that I am the J. E. Kinney, physician, Denver, Colorado, named in the stipulation in the above entitled matter relative to my testimony and that I have read said stipulation, and that the matters set forth and the statements made in paragraph 2 of said stipulation constitute a correct recital of my knowledge and recollection of the matters therein referred to, involving my professional activities with reference to Edwin B. Hendrie, and that if I were placed on the stand I would testify as true, in substance, those matters set forth in said paragraph 2.

J. E. Kinney.

Subscribed and sworn to before me this 4th day of October, 1935. Dorothy D. Edwards, Notary Public. My commission expires April 16, 1936. (Seal.)

#### Stipulation

Whereas, this matter involves, among other things, the question of whether or not Edwin B. Hendrie executed a trust agreement on January 7, 1927, in contemplation of death or in contemplation of his continued life: and,

Whereas, the petitioners have made application for an order to take the deposition of Dr. J. E. Kinney, 606 Metropolitan Building, Denver, Colorado; and,

[fol. 40] Whereas, it seems expedient to the parties to stipulate concerning the testimony of the said Dr. J. E. Kinney so that the same may be available to the Petitioners if by any chance said witness is not available at the time.



of any hearing in this matter before the United States Board of Tax appeals;

Now, Therefore, it is stipulated and agreed between the parties hereto as follows:

1. That said Dr. J. E. Kinney would testify, if now examined, pursuant to commission or stipulation, generally as set forth in paragraph 2 hereof, and that to avoid the taking of his deposition, it is understood between the parties that the result of taking his deposition would be the producing of the evidence set forth in paragraph 2 hereof, and that such paragraph 2 may be introduced as evidence by either party hereto at the time of any hearing or trial of this matter before the United States Board of Tax Appeals with the same force and effect as though said Dr. J. E. Kinney had appeared in person before said Board and so testified, and with the same force and effect as though his deposition were now taken and such testimony set forth in said deposition and said deposition were introduced at said hearing or trial; Provided, however, that if at the time of any such hearing or trial said Dr. J. E. Kinney is available as a witness and subject to the subpoena of the Board and it is possible to produce him at the trial and for him there to testify, then and in such event this stipulation shall be of no force or effect in connection with said hearing or trial.

2. That over a period of years Dr. J. E. Kinney was the family physician of Mr. E. B. Hendrie; that he was consulted by Mr. Hendrie July 11, 1927, and at that time Mr. Hendrie gave him his history as having had no illness, except occasional slight attacks of rheumatism; that his appetite was good; that he slept well, and that he had no pains or symptoms of trouble anywhere, but that he came to be checked up, which was something he did periodically.

That Dr. Kinney gave Mr. Hendrie a careful examination at that time and found normal heart action except pulse slightly accelerated, lungs normal, blood pressure 74-122; examination of urine showed a normal condition. Mr. Hendrie was mentally clear and concise in his statements, free from suspicion or trace of any abnormality and reflexes were normal; that at that time Mr. Hendrie was eighty [fol. 41] years and six months old, and that his physical



and mental conditions were much better than the average of persons of his age.

Dr. Kinney had known Mr. Hendrie very intimately for many years prior to this examination, and afterwards to the time of his death, which took place on July 15, 1932, and that Dr. Kinney never had seen any evidences of any disease or abnormal conditions until several years after the said examination of July 11, 1927; that at no time during the period of Dr. Kinney's friendship with Mr. Hendrie, nor at the time of said examination did Mr. Hendrie indicate any fear or expectancy of death, but at all times spoke of plans for business activities, trips and other matters connected with his current life; that Dr. Kinney was Mr. Hendrie's attending physician in his last illness, and that the primary cause of his death was acute pyelo-nephritis.

Grant, Ellis, Shafroth & Toll, Erl H. Ellis, C. Clifton Owens, Attorneys for Petitioners. (Sgd.) Robert H. Jackson, Attorneys for Respondent.

#### EXHIBIT "E" TO STIPULATION OF FACTS

##### Affidavit of Frank N. Bancroft

I hereby state that I am the Frank N. Bancroft, attorney at law, Denver, Colorado, named in the Stipulation in the above entitled matter relative to my testimony and that I have read said Stipulation and that the matters set forth and statements made in Paragraph 2 of said Stipulation constitute a correct recital of my knowledge and recollection of the matters therein referred to involving my drafting of a trust agreement for Edwin B. Hendrie, and that if I were placed on the stand I would testify as true in substance as set forth in said paragraph 2.

Frank N. Bancroft.

Subscribed and sworn to before me this 15 day of March, 1935. Alma B. Fitzer, Notary Public. My notarial commission expires March 1, 1936.

##### Stipulation

[fol. 42] Whereas, this matter involves, among other things, the question of whether or not Edwin B. Hendrie executed a trust agreement on January 7, 1927, in contem-

plation of death or in contemplation of his continued life; and

Whereas, the Petitioners have made application for an order to take the deposition of Mr. Frank N. Bancroft, attorney at law, University Building, Denver, Colorado; and

Whereas, it seems expedient to the parties to stipulate concerning the testimony of said witness so that the same may be available to the Petitioners if by any chance said witness is not available at the time of any hearing in this matter before the United States Board of Tax Appeals:

Now, Therefore, It is stipulated and agreed between the parties hereto as follows:

1. That said Frank N. Bancroft would testify, if now examined pursuant to commission or stipulation, generally as set forth in paragraph 2 hereof, and, that to avoid the taking of his deposition, it is understood between the parties that the result of taking his deposition would be the producing of the evidence set forth in paragraph 2 hereof, and that such paragraph 2 may be introduced as evidence by either party hereto at the time of any hearing or trial of this matter before the United States Board of Tax Appeals with the same force and effect as though said Frank N. Bancroft had appeared in person before said Board and so testified, and with the same force and effect as though his deposition were now taken and such testimony set forth in such deposition and said deposition were introduced at said hearing or trial; Provided, however, that if at the time of any such hearing or trial said Frank N. Bancroft is available as a witness and subject to the subpoena of the Board and it is possible to produce him at the trial and if it is possible for him to there testify, then and in such events this stipulation shall be of no force or effect in connection with said hearing or trial.

2. That in the fall of 1926 and in the winter of 1926-1927 Frank N. Bancroft was the trust officer of The Colorado National Bank, having been employed in that capacity for several years and having practiced law in Denver for a great many years.

[fol. 43] That in the latter part of 1926 Edwin B. Hendrie, then President of Hendrie & Bolthoff Manufacturing and Supply Company at Denver, Colorado, requested Mr. Bancroft to meet Mr. Hendrie at the latter's place of business

and Mr. Hendrie then explained to Mr. Bancroft for the first time that Mr. Hendrie had been considering for a considerable period how he might best transfer a part of his assets in the interest of his daughter, Gertrude Hendrie Grant, her descendants and for her heirs; so that, whatever might happen to his own financial affairs in the future, such persons would be provided for.

Mr. Hendrie discussed with Mr. Bancroft the then present and future needs of his daughter and her children, also the character of securities that he desired to put into the trust, and what sort of provisions should be made to protect these securities and yet provide for his daughter and her children.

Mr. Hendrie expressed the direct wish that The Colorado National Bank should act as trustee in such connection.

Mr. Hendrie stated to Mr. Bancroft that the amount he wished to place in the trust would constitute about one-third of his then fortune, and would be made up of those securities of the more stable sort, requiring the least attention.

Subsequent to the first interview Mr. Bancroft and Mr. Hendrie met frequently both at Mr. Hendrie's place of business and at midday luncheons and several drafts of trust agreements were prepared and submitted by Mr. Bancroft, and discussed with Mr. Hendrie.

Mr. Hendrie expressed at many of the aforesaid meetings with Mr. Bancroft the thought that after he made this trust agreement he would then have his more speculative securities left and would feel free for the rest of his life to speculate in whatever securities he might wish and that his purpose in making the trust agreement was to transfer the trust corpus in the manner provided for in said trust deed and thereby putting it entirely beyond his own power to otherwise dispose of the same contrary to the provisions of the said trust deed and to remove it from the vicissitudes of his speculations. Mr. Hendrie expressed doubt as to the stability of the market and expressed a desire to "play on the market" more actively and in a more speculative way than in the past. Mr. Hendrie often spoke of his intention of thus [fol. 44] occupying himself for the rest of his life, and in giving less time to the Hendrie and Bolthoff business.

Mr. Hendrie at all times indicated that his thought was how to word the trust agreement so that, whatever might happen to him financially in the future and in regard to his remaining fortune, the corpus of the trust would in nowise

be jeopardized thereby, or prevent the disposition of said corpus in the manner provided for in said trust deed.

That the result of the numerous meetings and discussions was the final signing of the trust agreement of January 7th, 1927.

That at all times that Mr. Bancroft talked with Mr. Hendrie during the preparation of said trust agreement and for several year thereafter Mr. Hendrie appeared to be in good health, actively managing his own business affairs, and that Mr. Bancroft kept in constant touch with him as trust officer at said bank in regard to the workings of the trust agreement.

That at no time in said discussion did Mr. Hendrie indicate that he entertained any thought of impending death or that he expected his death within the immediate or reasonably near future, nor did he discuss the problem of avoidance of death or inheritance taxes nor discuss any problems as to the disposition of the rest of his fortune.

Grant, Ellis, Shafroth & Toll, Eri H. Ellis, C. Clifton Owens, Attorneys for Petitioners. Robert H. Jackson, Attorney for Respondent.

#### EXHIBIT "F" TO STIPULATION OF FACTS

##### Affidavit of W. W. Grant

I hereby state that I am the W. W. Grant, son-in-law of Edwin B. Hendrie, Denver, Colorado, named in the stipulation in the above entitled matter relative to my testimony, and that I have read said stipulation, and that the matters set forth, and the statements made in paragraph 2 of said stipulation constitute a correct recital of my knowledge and recollection of the matters therein referred to, involving my [foi. 45] professional activities with reference to Edwin B. Hendrie, and that if I were placed on the stand I would testify as true, in substance, those matters set forth in said paragraph 3.

W. W. Grant.

Subscribed and sworn to before me this 4th day of October, A. D. 1935. My commission expires April 16th, 1936. Dorothy D. Edwards, Notary Public.  
(Seal.)



### Stipulation

Whereas, this matter involves, among other things, the question of whether or not Edwin B. Hendrie executed a trust agreement on January 7, 1927, in contemplation of death or in contemplation of his continued life; and,

Whereas, the petitioners have made application for an order to take the deposition of W. W. Grant, 730 Equitable Building, Denver, Colorado; and,

Whereas, it seems expedient to the parties to stipulate concerning the testimony of the said W. W. Grant so that the same may be available to the Petitioners if by any chance said witness is not available at the time of any hearing in this matter before the United States Board of Tax Appeals;

Now, Therefore, It is stipulated and agreed between the parties hereto as follows:

1. That said W. W. Grant would testify, if now examined, pursuant to commission or stipulation, generally as set forth in paragraph 2 hereof, and that to avoid the taking of his deposition, it is understood between the parties that the result of taking his deposition would be the producing of the evidence set forth in paragraph 2 hereof, and that such paragraph 2 may be introduced as evidence by either party hereto at the time of any hearing or trial of this matter before the United States Board of Tax Appeals with the same force and effect as though said W. W. Grant had appeared in person before said Board and so testified, and with the same force and effect as though his deposition were now taken and such testimony set forth in said deposition and said deposition were introduced at said hearing or trial; Provided, however, that if at the time of any such [fol. 46] hearing or trial said W. W. Grant is available as a witness and subject to the subpoena of the Board, and it is possible to produce him at the trial and for him there to testify, then and in such event this stipulation shall be of no force and effect in connection with said hearing or trial.

2. That W. W. Grant was the son-in-law of Edwin B. Hendrie and knew him intimately through constant, almost daily association, since April, 1910; that he was more or less familiar with the business affairs of the said Edwin B. Hendrie and was in a position to know something of them, as well as of his health and general activities for many years prior to the death of the said Edwin B. Hendrie.



That the said Edwin B. Hendrie appeared to be in excellent health and spirits up to within a few months of the date of his death; that until the last year of his life he spent each winter in California, going and returning by himself; that he was in the habit of speculating on a considerable scale, particularly during the last five or six years of his life; that at one time he stated to the said W. W. Grant that his daughter and his grandchildren would be adequately provided for in the event of his, the said Hendrie's death, through the medium of a trust which he had created, regardless of his operations on the Stock Exchange.

That the said W. W. Grant kept the books of the said E. B. Hendrie during the latter part of his, the said Hendrie's life, and was as a result familiar with his operations; that he first learned of the said trust about 1930 when the said Hendrie made the statement above mentioned; that up until six months of the date of his death the said Hendrie took regular daily exercise by means of walks, setting-up exercises, and occasional games of golf, and read market reports and services up until his last illness, all the time maintaining and expressing a lively interest in the future trend of American business and markets.

Grant, Ellis, Shafroth & Toll, Erl H. Ellis, C. Clifton Owens, Attorneys for Petitioners.

[fol. 47] EXHIBIT "G" TO STIPULATION OF FACTS

Last Will and Testament of Edwin B. Hendrie

Know All Men by These Presents:

That I, Edwin B. Hendrie, a resident of the City and County of Denver, in the State of Colorado, being of sound mind and memory do hereby make, publish and declare this to be my last Will and Testament, hereby revoking all other Wills and Testaments heretofore made by me.

First. I direct my Executors to pay all of my just debts as soon as practicable.

Second. I give and bequeath to my sister, Mrs. R. J. Cory, of Presidio, California, if she is alive at the time of my death, and if not then to her heirs at law under the intestate laws of the State [E. B. H.] of Colorado, the sum of Eight Thousand Dollars (\$8,000.00).

Third. I give and bequeath to my niece, Gladys Hendrie, of Orange, New Jersey, if she is alive at the time of my death, and if not then, to her heirs at law under the intestate laws of the State of Colorado, the sum of Four Thousand Dollars (\$4,000.00).

Fourth. I give and bequeath to my nephew, Charles Hendrie, of Orange, New Jersey, if he is alive at the time of my death, and if not then to his heirs at law under the intestate laws of the State of Colorado, the sum of Four Thousand Dollars (\$4,000.00).

Fifth. I give and bequeath to my niece, Marion True Reynolds, of Boulder, Colorado, if she is alive at the time of my death, and if not then to her heirs at law under the intestate laws of the State of Colorado, the sum of Four Thousand Dollars (\$4,000.00).

Sixth. I give and bequeath unto St. John's Church in the Wilderness, of Denver, Colorado, the sum of Ten Thousand Dollars (\$10,000.00), for the purpose and installation in the Cathedral of said church of a memorial window bearing the inscription "Suffer Little Children to Come Unto Me" in memory of my beloved wife, Marian C. Hendrie.

Seventh. I give, devise and bequeath unto my daughter Gertrude Hendrie Grant, of Denver, Colorado, and to her [fol. 48] heirs and assigns forever, my residence property (realty and personalty), in Denver, Colorado, with all of its furnishings and contents.

Eighth. I give, devise and bequeath unto my daughter, Gertrude Hendrie Grant, and unto The Colorado National Bank of Denver, a national banking association, doing business in the City and County of Denver, State of Colorado, as Trustees, and in the event of the death, resignation or refusal to act of my said daughter, then to The Colorado National [E. B. H.] Bank of Denver as sole Trustee, all of the rest, residue and remainder of my estate, real, personal and mixed of every kind and character that I may own or have any interest in at the time of my death, to hold, manage, and dispose of under the following trust, to-wit:

I direct my Trustees, or my Trustee as the case may be, to take over, manage, invest and reinvest my trust estate in such manner and in such securities and properties as they or it in their or its uncontrolled discretion may think best.

without obtaining any order of Court therefor, and I direct my Trustees as well as my Executors to pay to my daughter, Gertrude Hendrie Grant, from the time of my death so long as she shall live the sum of Five Thousand Dollars (\$5,000.00) a month, and from the time of the closing of my estate by my Executors to pay to my grandson, Edwin Hendrie Grant, who is now sixteen (16) years of age, to my grandson, William West Grant III, who is now fourteen (14) years of age, to my granddaughter, Melanie Mortimer Grant, who is now eleven (11) years of age, all being children of my said daughter, Gertrude Hendrie Grant, and to any other child or children who may hereafter be born to my daughter, Gertrude Hendrie Grant, the sum of Four Thousand Dollars (\$4,000.00) per year to each of said grandchildren to be paid in equal monthly installments until the then youngest living child of said three children of my daughter who are now living has reached the age of thirty (30) years, at which time, if my said daughter Gertrude Hendrie Grant, is then deceased, and if she is not then deceased, then thereafter at the time of her decease, I direct my Trustee to turn over, deliver and convey all of the remainder of my said trust estate equally to the then living children of my said daughter, Gertrude Hendrie Grant, [E. B. H.] and to the descendants of any deceased child of my said daughter, Gertrude Hendrie Grant, the descendants taking per stirpes and not per capita, that is, the descendants taking the share that their respective parents would have [fol. 49] taken if living. During the minority of any of my said grand children I direct my Trustees to make all payments heretofore directed to be made to them, to their mother Gertrude Hendrie Grant if she is alive and her receipt to my Trustees for such payments shall be a full acquittance to my said Trustees.

In order that my said Trustees, or my said Trustee as the case may be, may be enabled to carry out the terms of my said trust, I do hereby give and grant unto my said Trustees or my said Trustee as the case may be, full power and authority to sell, convey, lease, exchange, mortgage, assign and transfer or otherwise dispose of any part or all of my said trust estate to such person or persons, upon such terms and for such price or prices as they or it may in their or its uncontrolled discretion think best without the purchaser being obliged to look to the application of the

purchase money paid therefor; to execute and deliver deeds of conveyance, mortgages, leases, assignments, bills of sale and each and every other instrument which may be, or may seem necessary or proper in connection with the management and disposition of the properties of said trust estate; to invest and reinvest the proceeds arising from the sale, mortgaging, transfer, assignment or other disposition or from the income from any of the properties of said trust estate; to purchase and otherwise acquire any and all kinds of property including real estate, stocks, bonds, notes and choses in action of every kind and nature; to collect, recover and [E. B. H.] receive rents, income and profits from the properties constituting said trust estate; to loan any and all moneys belonging to said trust estate on such terms and conditions as my said Trustees or my said trustee as the case may be, may deem proper; to improve in such manner as my Trustees or my Trustee may think best any real estate belonging to my said trust estate and to do any and all other things that my Trustees or my Trustee may think necessary or proper in order to fully manage, invest and dispose of my trust estate as they in their uncontrolled discretion may think best, as fully and completely as I could do if living, and I direct that no bond shall be required of my Trustees or of my Trustee as the case may be for the faithful performance of their or its duties as such.

Ninth. I hereby nominate, constitute and appoint my daughter, Gertrude Hendrie Grant, and The Colorado National Bank of Denver, Executors of this my last Will and Testament, with all of the powers heretofore and herein [fol. 50] conferred upon my Trustees, and I direct that no bond shall be required of my Executors for the faithful performance of their duties as such.

In Witness Whereof, I have hereunto set my hand and seal and have initialed on the margin thereof each of the preceding four pages of this my last Will and Testament, at Denver, Colorado, this 26th day of January, A. D. 1925.

Edwin B. Hendrie. (Seal.)

Signed, sealed, published and declared by the said Testator, Edwin B. Hendrie, who is of sound mind and memory, [E. B. H.] more than twenty-one years of age and under no restraint or duress of any kind, as and for his last Will and



Testament, in the presence of us who, at his request, in his presence and in the presence of each other have hereunto subscribed our names as attesting witnesses on the day of the date thereof.

George B. Berger, Denver, Colorado. Theron F. Field, Denver, Colorado. Merriam Berger, Denver, Colorado.

**BEFORE UNITED STATES BOARD OF TAX APPEALS**

**PRÆCIPUE FOR RECORD—Filed April 27, 1937**

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Tenth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
  - (a) Petition, including annexed copy of deficiency letter.
  - (b) Answer.
3. Memorandum opinion and decision of the Board.
- [fols. 51-52] 4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Stipulation of facts and exhibits A to G, both inclusive, attached thereto.
6. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record, not included in record.
7. This præcipe.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

Service of a copy of the within præcipe is hereby admitted this 23 day of April, 1937.

Grant, Ellis, Shafroth & Toll, (Sgd.) Erl H. Ellis,  
Attorney for Respondent.



Clerk's certificate to foregoing transcript omitted in printing.

[fol. 53] Minute entries of argument and submission omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

No. 1566

JANUARY TERM, 1938

Warren F. Wattles (James W. Morris, Assistant Attorney General, Sewall Key, Norman D. Keller and S. Dee Hanson, Special Assistants to the Attorney General, were with him on the brief) for petitioner.

W. W. Grant (Grant, Shafroth & Toll were with him on the brief) for Respondents.

Before Lewis, Bratton and Williams, Circuit Judges

OPINION—January 31, 1938

BRATTON, Circuit Judge, delivered the opinion of the court.

[fol. 54] This petition for review of a decision of the Board of Tax Appeals presents the question of liability for a deficiency in estate taxes. Edwin B. Hendrie, a resident of Denver, Colorado, established an irrevocable trust on January 7, 1927, and died on July 15, 1932. The executors named in his will filed an estate tax return which failed to include the value of the trust as a part of the gross estate. The Commissioner of Internal Revenue determined that the transfer to the trust was made in contemplation of death of decedent and to take effect in possession or enjoyment at or after his death; and that the value of the trust at the date of death should be included in the gross estate. A deficiency in death transfer taxes followed. The Commissioner advanced the single contention before the Board that the transfer was made in contemplation of death. The Board decided otherwise, and on recomputation reduced the deficiency to a relatively small sum. The Commissioner seeks review and renews the contention.

Decedent was eighty years of age at the time the trust was created, and he was past eighty-five at the date of his death. The trust instrument named the Colorado National Bank as trustee, and provided that the trustee should have and exercise all of the powers of management and control of the property constituting the trust that decedent would have if he were then in the sole and absolute possession and control of it, except that during his life all sales of securities and reinvestments should be subject to his approval; that the income accumulating during the life of decedent should be added to the corpus and treated as principal; that after his death the net income, or so much thereof as she might call for, should be paid to Gertrude Hendrie Grant, daughter of the decedent, during her life; that upon the death of such daughter, the estate should be paid equally to her then living children and to the descendants of any deceased child, such descendants taking per stirpes and not per capita; that in the event the daughter should die leaving no child or children or descendants of any child surviving her, the estate should be delivered and conveyed to her heirs at law under the then intestate laws of the State of Colorado; that no title in any part of the trust or the income accruing thereto should vest in any beneficiary during the continuance of the trust; and that no beneficiary should anticipate, encumber, assign, or transfer his or her interest therein prior to the actual distribution. Securities of the face value of \$827,000.00 were [fol. 55] enumerated as the trust property, and decedent reserved the right to make additions thereto from time to time. The return made by the executors reported a gross estate of \$938,006.38. That was exclusive of the property transferred to the trust.

By stipulation, verified statements of the trust officer of the bank, a physician, and the son-in-law of decedent were submitted in lieu of their testimony; and no other testimony was offered. The trust officer stated that decedent conferred with him several times concerning the preparation of the trust instrument. He discussed in the conferences the then present and future needs of his daughter and her children; he stated that he had considered for some time the method through which he might transfer a part of his assets in the interest of his daughter and her descendants so that they would be provided for whatever might happen to his own financial affairs in the future; that the amount he wished to transfer to the trust would constitute about

one-third of his present fortune; that after making the trust he would still have his more speculative securities left and would feel free for the rest of his life to speculate in whatever securities he might wish; and that the purpose in creating the trust was to transfer the trust corpus in that manner thereby putting it beyond his power to dispose of the property otherwise, and thus remove it from the vicissitudes of his speculations. He indicated that the dominant thought in mind was to so word the trust agreement that whatever might happen to him financially in respect to his remaining property, the corpus of the trust would not be jeopardized. He did not indicate that he entertained any thought of impending death, or that he expected death in the immediate or reasonably near future, and he did not discuss the problem of avoiding death or inheritance taxes. The physician stated that decedent consulted him on July 11, 1927, and had a periodical examination. He gave the physician a history of no illness, except occasional slight attacks of rheumatism. He stated that his appetite was good; that he slept well; that he had no pains or symptoms of trouble; and that he had come for a check-up. Upon careful examination, the physician found normal heart action except slightly accelerated pulse, normal lung action, normal condition of the urine, and blood pressure of 74-122. His reflexes were normal, his mental condition clear, his statements concise, and he was free from suspicion or trace [fol. 56] of abnormality. It was the opinion of the physician that his physical and mental condition was much better than that of the average person at that age. The cause of death was acute pyelo-nephritis. The son-in-law, engaged in the practice of law at Denver, stated that he was more or less familiar with the business affairs of decedent and was in position to know something about them, as well as his health and general activities; that decedent appeared to be in excellent health and spirits up to within a few months of his death; that until the last year of his life, he spent each winter in California, making the trip each way alone; that he speculated on a considerable scale, particularly during the last five or six years of his life; that on one occasion in 1930 he stated to his son-in-law that regardless of his operations on the stock exchange, his daughter and grandchildren would be adequately provided for in the

event of his death through the medium of a trust which had been created; that the son-in-law first learned of the trust through that statement; that up until six months of the date of his death, the decedent took regular daily exercise by means of walks, setting-up exercises and occasionally games of golf; that he read market reports and services up until his last illness; and that at all times he maintained and expressed a lively interest in the future trend of business and markets.

Decedent made a will in 1925, in which it was provided that all of his estate, except his residence in Denver which was bequeathed to his daughter and five legacies in cash aggregating \$30,000.00, should be placed in trust for the benefit of his daughter and her children with remainders to the children. His daughter and the Colorado National Bank were named as trustees and as executors; and they were directed to make periodical cash payments to the daughter and her children. That will was in effect at the time the trust was created.

Section 301 of the Revenue Act of 1926 (44 Stat. 9), lays a tax at progressively graduated percentages upon the net estate of every decedent dying after the effective date of the act. The substance and effect of the material part of section 302c is to provide that the value of property transferred to a trust shall be included in the gross estate if the transfer was made in contemplation of death. The initial provision of this kind was contained in the Revenue Act of [fol. 57] 1916, and similar legislation has found its way into the several subsequent revenue measures. The purpose of such legislation is to reach substitutes for testamentary disposition of property and thus to prevent evasion of the tax. *Nichols v. Coolidge*, 274 U. S. 531; *Milliken v. United States*, 293 U. S. 15; *United States v. Wells*, 283 U. S. 102. And the power of Congress to provide that property transferred in that manner shall be included in the gross estate of a decedent is not open to doubt. *Heiner v. Donnan*, 285 U. S. 312.

In the very nature of things it is impossible to define with precision the transactions which fall within the ambit of the statute. Each case must be determined by its own facts and circumstances. The statute is not confined to gifts causa mortis. It may include gifts inter vivos which are irrevocable and indefeasible. The test lies in the motive for



the transfer. If the generating source of the motive is associated with life, the transfer is not made in contemplation of death. But if the generating inducement is associated with death, either immediate or distant, the transfer is made in such contemplation. A gift is made in contemplation of death where the dominant motive of the donor is to make proper provision for the object of his bounty after the death of the donor. Stated, otherwise, it is sufficient to support the tax if the transfer is motivated by the same considerations as those which prompt testamentary disposition of property without awaiting death. *United States v. Wells*, supra; *Heiner v. Donnan*, supra; *Becker v. St. Louis Trust Co.*, 296 U. S. 48; *Willcuts v. Stoltz*, 73 F. (2d) 868; *Igleheart v. Commissioner*, 77 F. (2d) 704. In determining the motive which prompts a transfer appropriate consideration should be given to such factors as the time intervening between the date of the transfer and death, age, condition of body and mind, desire to be relieved of responsibility, desire to subject the donee to responsibility, desire to discharge moral obligations, a purpose to continue a previously adopted policy, and others of that nature.

Here the decedent was eighty years of age at the time of the transfer. There is no suggestion that he had made similar transfers or had pursued a policy of making large gifts to his daughter and her children. He had executed a will in which it was provided that virtually all of his estate should be placed in trust for their benefit, and it was still [fol. 58] in effect. He stated to the trust officer of the bank in the course of their conferences concerning the preparation of the trust instrument that he desired to make the transfer in the interest of his daughter and her children so that they would be provided for whatever might happen to his own financial affairs in the future; that the amount he wished to transfer would constitute about one-third of his then existing fortune; that after making the transfer he would still have his more speculative securities left, and would feel free for the rest of his life to speculate in whatever securities he might select; and that the instrument should be so worded that whatever might happen to him financially in respect to his remaining property, provision would be made for his daughter and her heirs. He discussed the kind of provisions which should be included in the instrument to protect the securities, and yet provide for his



daughter and her children. He did speculate on a considerable scale, particularly during the last five or six years of his life which included the time after the transfer; and he stated to his son-in-law that regardless of his operations on the stock exchange, in the event of his death his daughter and the grandchildren would be adequately provided for through the trust which had been established. The trust was not designed to make provision for the beneficiaries during his life. None of the property or the increment thereto was to reach them until after his death. Neither was it designed to enable him to engage in speculation. He could have done that unfettered and unrestrained without the establishment of the trust. But in its absence the property transferred would have been subject to the hazards of speculation. It would have been within reach of creditors if he lost all. The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life but after his death. Certainty that the property would be devoted to that use was the objective, and the transfer was a means to that end. His desire for that certainty was gratified by the transfer. The purpose was a commendable one, but the generating motive for a transfer made in such circumstances is associated with death. It follows that the transfer [fol. 59] was made in contemplation of death within the meaning of the statute, though decedent was in sound health of body and mind and did not entertain thought of death immediately or in the near future. *United States v. Wells*, supra; *Igleheart v. Commissioner*, supra; *Farmers' Loan & Trust Co. v. Bowers*, 68 F. (2d) 916, certiorari denied 293 U. S. 565.

The case of *Brown v. Commissioner*, 74 F. (2d) 281, is not to the contrary. There the donor had made gifts to members of his family from time to time for twenty years, in order to provide them with independent incomes during his life. The particular gift in question was made to his wife in continuance of that policy, and to afford her immediate protection against the vicissitudes of his speculations. He

did not state or intimate at any time that he had in mind making provision for her after his death in the event he lost everything else. Here the decedent stated that purpose to be his motive. That difference is controlling.

It is settled law that a finding of fact made by the Board of Tax Appeals will not be disturbed on review if it is supported by substantial evidence. But whether there is substantial evidence to support a finding is a question of law. *Folk v. Commissioner*, 67 F. (2d) 779. And a finding not thus supported will be set aside. *Champlin v. Commissioner*, 71 F. (2d) 23. We fail to find any substantial evidence that the transfer under consideration was not made in contemplation of death within the meaning of the statute.

The decision of the Board is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

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#### DISSENTING OPINION

Lewis, Circuit Judge, dissents:

The Commissioner claims the trust was set up by Mr. Hendrie in contemplation of death within the meaning of section 302(c) of the Revenue Act of 1926. That is the issue. I disagree with the majority. To me it seems clear from the uncontradicted testimony that Mr. Hendrie's gift to his daughter and her children was not made in contemplation of death but in order that he might speculate upon the stock market for the remainder of his life more actively than he had in the past without fear that the part of his fortune thus given might be lost. He manifested no other intent and [fols. 60-64] purpose in that respect. He did speculate on the stock market during the last five or six years of his life on a considerable scale. Future business activities were contemplated, not death. In my opinion the decision of the Board of Tax Appeals is amply supported by the evidence.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—January 31, 1938

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

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On consideration whereof, it is now here ordered and adjudged by this court that the decision of the United States Board of Tax Appeals in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to said United States Board of Tax Appeals for further proceedings not inconsistent with the opinion of this court; and that Commissioner of Internal Revenue, petitioner, have and recover of and from The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, deceased, respondents, his costs herein.

[fol. 65] IN UNITED STATES CIRCUIT COURT OF APPEALS,  
TENTH CIRCUIT

No. 1566

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

THE COLORADO NATIONAL BANK OF DENVER and Gertrude  
Hendrie Grant, Executors of the Estate of Edwin B.  
Hendrie, Deceased, Respondents

Appeal from the United States Board of Tax Appeals

PETITION FOR REHEARING—Filed March 1, 1938

To the United States Circuit Court of Appeals for the Tenth  
Circuit and the Judges Thereof:

Come now The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, Respondents in the above entitled cause, and present this, their petition, for a rehearing of the above entitled cause and in support thereof respectfully show:

[fol. 66] 1. The court has disregarded the opinion of the Board of Tax Appeals which found that in view of all of the circumstances of the case the gift was not made in contemplation of death. It has substituted its own opinion on this question of fact for the finding of the Board. This is beyond its power.



2. The court has disregarded all evidence as to motive save the language of the trust deed itself. The majority opinion in effect creates a conclusive presumption that gifts in trust, the income of which is withheld from the beneficiary till after donor's death, are in contemplation of death. This is contrary to the statute, the Treasury regulations and the decisions of the United States Supreme Court, particularly *Shukert v. Allen*, 273 U. S. 545, 47 S. Ct. 461, 71 L. Ed. 764; *Reinecke v. Northern Trust Company*, 278 U. S. 339, 73 L. Ed. 410; and *McCormick v. Burnet*, 283 U. S. 783, 75 L. Ed. 1413.

3. The majority opinion has confused gifts "in contemplation of death" and those "intended to take effect in possession or enjoyment at or after death." The government makes no claim that the Hendrie gift falls in the latter class because, being irrevocable, it is not taxable as such, *May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826, *Reinecke v. Northern Trust Company*, 278 U. S. 339, 73 L. Ed. 410. Yet the court makes the conclusive presumption that such gifts held not taxable under the second statutory class are taxable under the first. The history of the law and the regulations show this to be unsound.

4. The majority opinion misconstrues the statutory provision providing for the taxation of gifts "in contemplation of death." The court has confused the meaning of "contemplation of death" with the expression "associated with death," failing to differentiate between "contemplation of death" and the "general expectation of death" common to all men which does not bring a transfer within the statutory meaning.

5. The majority opinion has confused lifelong desire to care for one's children common to all men with the immediate and moving cause of the gift in this case. Contemplation of the danger of his proposed speculations—not contemplation of death—prompted the Hendrie trust.

[fol. 67-68] Wherefore, upon the foregoing grounds it is respectfully urged that the petition for rehearing herein be granted, and that the majority opinion of this court be withdrawn, and that an opinion be rendered herein affirming the United States Board of Tax Appeals in its holding that the gift is not taxable.

Respectfully submitted, Grant, Shafroth and Toll,  
Morrison Shafroth, Counsel for Respondents.



**Certificate of Counsel**

I, Morrison Shafroth, counsel for the above named The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Morrison Shafroth

[File endorsement omitted.]

**[fol. 69] IN UNITED STATES CIRCUIT COURT OF APPEALS**

**ORDER DENYING PETITION FOR REHEARING—April 4, 1938**

This cause came on to be heard on the petition of respondent for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

**IN UNITED STATES CIRCUIT COURT OF APPEALS**

• **MOTION FOR STAY OF MANDATE—Filed April 6, 1938**

Come now The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, Respondents in the above entitled cause, by their attorneys, Grant, Shafroth and Toll and Morrison Shafroth, and move that the court enter an order staying the issuance of the mandate in said cause for thirty (30) days from this date, and as reasons for said motion, they respectfully represent that said period of time is necessary to enable Respondents to apply to the United States Supreme Court for issuance of a writ of certiorari, which application will be made in the immediate future.

Dated this 6th day of April, 1938.

Respectfully submitted, Grant, Shafroth & Toll, Morrison Shafroth, Attorneys for Respondents.

*Duly sworn to by W. W. Grant. Jurat omitted in printing.*

[File endorsement omitted.]

## [fol 70] IN UNITED STATES CIRCUIT COURT OF APPEALS

## ORDER GRANTING STAY OF MANDATE—April 6, 1938

This cause came on to be heard on the motion of respondents for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's certificate to foregoing transcript omitted in printing.

## [fol 71] SUPREME COURT OF THE UNITED STATES

## ORDER ALLOWING CERTIORARI—Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,489. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 30. The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, petitioners, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed May 2, 1938. Term No. 30, O. T., 1938.